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Summary record of the 750th meeting
Held at Headquarters, New York, on Monday, 24 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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02-43900 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514; A/CN.9/XXXV/CRP.1 and Adds.1-5)

Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514)

1. **The Chairman** said that the secretariat had asked for guidance from the Commission as to how it wished to proceed with the drafting of the Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation.

2. **Mr. Sekolec** (Secretary of the Commission) recalled that at the beginning of the discussion on the draft Guide to Enactment, the tentative conclusion seemed to have been that the final drafting of the Guide would be entrusted to the secretariat. However, since the discussions of the last two days had showed that the delegations were concerned with matters of specific wording, the secretariat found itself in a difficult position. As he saw it, there were two possible solutions. One was for the Commission to retain full control over the text of the Guide to Enactment, in which case it could not be adopted at the present session, and it would not be published until the final text had been approved. The other alternative was to trust the secretariat to produce a text which reflected the wishes of the Commission to the best of its understanding. In the latter case, the secretariat would need to have freedom to make changes, to include texts that the delegations had not seen and to be ultimately in control of the final content of the Guide.

3. **Mr. Jacquet** (France), **Mr. Heger** (Germany), **Mr. Miki** (Japan), **Ms. Moosa** (Singapore) and **Mr. Tang** Houzhi (China) said that they would prefer to leave the actual drafting of the Guide up to the secretariat. They were confident that it would do an excellent job.

4. **The Chairman** said that if he heard no objection, he would take it that the Commission wished to entrust the secretariat with the task of drafting the Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation. The Secretary would take note of any proposals and suggestions that delegations might wish to make, but would not be required to respond or to include them in the final text.

5. *It was so decided.*

Article 10. Duty of confidentiality (paras. 58-60 of the draft Guide)

6. **Mr. Holtzmann** (United States of America) said that the words "duty of" should be deleted from the title of the article; he trusted that would be done when the final version of the Model Law was issued. He also reminded the secretariat that the United States had read into the record a statement (A/CN.9/SR.745) to be inserted in the Guide with respect to draft article 10 indicating that it was the intent of the drafters that in the event a court or other tribunal was considering an allegation that a person did not comply with article 10, it should include in its consideration any evidence of conduct of the parties that showed that they had or did not have an understanding that a conciliation existed and that consequently there was an expectation of confidentiality. A State that enacted the Model Law might wish to clarify article 10 to reflect that interpretation. It was his understanding that that interpretation had been approved and that it would be included in the draft to be produced by the secretariat.

Article 11. Admissibility of evidence in other proceedings (paras. 61-68 of the draft Guide)

7. **Ms. Renfors** (Sweden) said that the last sentence of paragraph 61 seemed to reflect the wording in the previous text of the article. It needed to be adapted so as to reflect the wording that had been approved during the previous week.

8. **Mr. Holtzmann** (United States of America) suggested that in dealing with paragraphs 62 to 67, the secretariat should make it clear that the draft Model Law provided for two mechanisms with respect to the use of evidence relating to the conciliation in other proceedings. On the one hand, there were the provisions that were similar to those in the UNCITRAL Conciliation Rules, according to which a party was not to rely on the evidence. That represented an obligation on the party not to do something. That was as far as the rules could go because the rules could not tell the court

(or an arbitrator) what it could or could not admit. The Conciliation Rules dealt with those matters of evidence listed in draft article 11 in terms of what "a party will not rely upon". In addition, there was a second method, whereby a court or arbitrator "will not admit". There was the concept of reliance and the concept of admissibility. He hoped the secretariat would make it clear in the Guide that article 11 of the Model Law provided for both reliance and admissibility.

9. **Mr. Chan** (Singapore) recalled that there had been considerable discussion of what was meant by the words "the law" in paragraph (3). It had been agreed that the phrase "the law" in that paragraph meant legislation. Thus, if legislation so prescribed, the information in question could be disclosed; a court or an arbitral tribunal or a competent government authority could order that the information be disclosed.

10. It had been understood by the Working Group that the words "under the law" did not mean a subpoena issued by the court. A subpoena issued by a court was an order made pursuant to law and could conceivably fall within the exception to the obligations imposed by the article on courts and arbitral tribunals and other authorities not to compel the disclosure of such information. Since his delegation's point had been raised late in the day, it had been decided that it could be dealt with in the Guide.

11. However, the reference to the matter in paragraph 7 of document A/CN.9/XXXV/CRP.1/Add.4 did not clearly explain his delegation's position on article 11, paragraph (3). He wished to request that in the preparation of the Guide, the secretariat should pay some attention to explaining that the words "the law" in paragraph (3) were not to be construed to mean orders made pursuant to the law by a court, a tribunal or some other authority, but referred only to existing legislation which provided for the compellability of such information. Otherwise, the entire purpose of the provision, which was to maintain confidentiality and thus enable parties to have certainty as to the circumstances under which such information would be kept confidential, would be undermined.

12. **Mr. Sekolec** (Secretary of the Commission) said he fully understood that the Commission's desire was to make sure that article 11 was as watertight as possible. However, any court decision entailed interpreting the law. The decision of an Australian court in the Esso case, for example, had cast a new light on the issue of the confidentiality of arbitration. As he understood it, to say that the words "the law" meant only legislation would still imply that it meant legislation as interpreted by courts. It would be hard to tell the courts that they could not interpret their law. He fully understood the position expressed by the representative of Singapore but was not sure how to express it in the text of the Guide.

13. **Mr. Chan** (Singapore) said that he had not used the words "court decisions", but rather "a subpoena issued by the court". The mischief that his delegation wished to prevent was a situation in which one party, who might or might not be involved in the conciliation, might apply to the court for a subpoena compelling the disclosure of information obtained during the conciliation which would otherwise be confidential in order to use it in other proceedings involving the same or other parties. He was not talking about a situation where a court, after full argument and consideration, decided that certain information that had been obtained in conciliation was or was not compellable. If the court decided that it was, notwithstanding arguments to the contrary, then that was the law. That had been the situation in the Esso case.

14. What must be avoided was the situation where a person went to the court with an affidavit and a document requesting the court to take action and got the court to issue a subpoena in order to compel that information to be produced at proceedings in which the parties to that particular conciliation did not expect such information to be made public. He recognized that where legislation provided for such information to be compellable in evidence or when a court decided that such information was compellable, then that was in fact the law. But he was concerned that the use of the phrase "the law" might be extended to a situation where a subpoena was issued without full consideration by the court, merely on an application by one party.

15. **Mr. Holtzmann** (United States of America) pointed out that draft article 11, paragraph (3), stated that the disclosure of the information referred to in paragraph (1) of that article could not be ordered by an arbitral tribunal or a court. A subpoena was an order to disclose certain information; in his delegation's view, the wording "shall not be ordered by an arbitral tribunal or a court" in paragraph (3) covered the problem that concerned the Singaporean delegation. However, he would have no objection to the Guide

making clear that the paragraph in question covered subpoenas.

16. His delegation also wished to suggest that the discussion of article 11 in the Guide should include wording to the effect that the phrase "similar proceedings" included discovery and deposition.

17. In paragraph 67 of the Guide, the penultimate sentence should be redrafted to insert the phrase "including documents prepared solely for the conciliation proceedings" after the word "statements".

18. **Mr. Sekolec** (Secretary of the Commission) asked the United States representative whether he intended to say that subpoenas were covered by paragraph (3). Was he endorsing the statement made by the representative of Singapore?

19. **Mr. Holtzmann** (United States of America) said that in his view, a court could not issue a subpoena for something covered by article 11 any more than a judge could order it to be heard in court. Those items were to be kept confidential. When a State adopted the Model Law, it adopted that provision and changed any contrary provision in its own law that might give the court unrestricted powers with respect to a subpoena.

20. **Mr. Sekolec** (Secretary of the Commission) said that a subpoena would always be issued on the basis of a law. What the Singaporean delegation had said was that subpoenas might be legitimate grounds for disclosure arising from conciliation but that such subpoenas should be only those that had been fully argued in court.

21. **Mr. Chan** (Singapore) said that the first sentence of paragraph (3) clearly stated that the information of the kind indicated in paragraph (1) was not compellable as evidence. However, the second sentence allowed an exception to that rule "to the extent required under the law". It should be made clear in the Guide that by "law" was meant written law and not the general power of the court to compel evidence. Otherwise, the whole point of the first sentence would be undermined, and abuses could occur in which parties were granted a subpoena in disregard of article 11.

22. His delegation was not saying that all subpoenas were impermissible. But a subpoena should be based on written laws governing the compellability and admissibility of evidence. Moreover, there was a greater need to compel evidence in a criminal case than in a civil case; that distinction should be made clear.

23. **Mr. Markus** (Observer for Switzerland) said that it was true that the phrase "required under the law" was too broad and needed to be clarified. The Singaporean delegation's view was that the expression should be qualified on the basis of formal criteria: the law in question should be in writing, should deal specifically with admissibility of evidence and so forth. However, in some legal systems based on case law or precedent, the laws of evidence might not be in writing. The key distinction, in his opinion, lay in the purpose or aim of the kinds of laws that could trigger an exception to inadmissibility of evidence. The Guide was too brief on that point, and the purposes indicated in the draft article itself, "implementation or enforcement of a settlement agreement", were too vague to be a sufficient guide.

24. **Mr. García Feraud** (Observer for Ecuador) said that under some legal systems both legislative acts and court precedent together created a body of binding jurisprudence. The words "under the law" had to be interpreted according to the particular legal system of the country. It should be noted, by the way, that the two reasons given in the paragraph for making an exception to the inadmissibility rule were separate and distinct; on the one hand, there might be exceptions required under the law and, on the other, there might be exceptions for the purposes of implementation or enforcement of a settlement agreement. Moreover, he feared that the discussion was focusing on the wording of the draft article, which had already been agreed on, rather than the wording of the Guide.

25. **Mr. Sekolec** (Secretary of the Commission) said that paragraph 67 of the draft Guide did give many examples of the type of exceptions the Commission had in mind. Perhaps the key distinction was between the public interest and the interests of a party. Exceptions to the inadmissibility rule should not be allowed merely in the interest of a party but should be allowed for reasons of public policy.

26. **Mr. Kovar** (United States of America) said his delegation agreed with Singapore that the phrase "required under the law" was too vague but did not believe that the test could turn on whether a subpoena was involved or whether the proceeding was *ex parte*. Paragraph 67 of the draft Guide was helpful but could be further expanded to clarify the issue.

Article 12. Termination of conciliation (para. 69 of the draft Guide)

27. **Mr. Komarov** (Russian Federation) said that, since the Commission had decided not to require a written declaration for termination of conciliation and had deleted the adjective "written" modifying "declaration" in subparagraphs (b), (c) and (d) of draft article 12, the Guide should stress the importance of a written declaration in determining the precise date of termination of conciliation proceedings in the event that a State opted to adopt a provision modelled on draft article X on suspension of limitation period in footnote 3 of draft article 4. Moreover, despite the deletion of "written" from draft article 12, the Guide still referred to article 6 of the Model Law on Electronic Commerce for a broad definition of "information in writing".

28. **Mr. Holtzmann** (United States of America) said that the Chairman had earlier very sensibly remarked in connection with the words "after consultation with the parties" in article 12, subparagraph (b), that the requirement of consultation was met if a party was given an opportunity to consult but chose not to do so; his delegation thought it would be useful to have that interpretation reflected in the Guide. On another point, the agreements referred to in paragraph 69 of the Guide could be concluded orally if the applicable law permitted. Since the declarations mentioned in subparagraphs (b), (c) and (d) of draft article 12 need not be in writing, it might be useful to explain in the Guide that a declaration could be expressed by conduct. A refusal to communicate or respond, for example, was tantamount to a declaration. Lastly, the quotation in footnote 4 of draft article 12 appeared in the Model Law on Electronic Commerce in the context of a definition of "data message"; it might be useful to give a brief explanation of a data message in the Guide.

29. **Mr. Heger** (Germany) said that his delegation agreed with the Russian Federation that, since a declaration no longer needed to be in writing, the Guide should describe the implications for a State wishing to provide for a suspension of limitation period for the duration of conciliation proceedings.

30. **Mr. Zanker** (Australia) said that his delegation agreed with Germany that the Guide should warn States about the need for precision about the date of termination of conciliation proceedings if a State decided to include a provision on suspension of limitation period. He also questioned whether footnote 4 was necessary at all if the declarations mentioned in draft article 12 did not need to be in writing.

31. **Mr. Jacquet** (France) said that his delegation agreed with the United States proposals concerning paragraph 69 of the draft Guide except for the suggestion that conduct should be considered equivalent to a declaration. In a matter as important as the termination of conciliation proceedings, that would be inappropriate. The United Nations Convention on Contracts for the International Sale of Goods provided an important precedent; although it gave much attention to conduct, it clearly distinguished conduct from statements.

32. **Mr. Zanker** (Australia) said that the Commission had, in fact, thoroughly rehearsed the issue of conduct being assimilated to a declaration. The point had been made that a party could not be forced to make a declaration. The reality was that a party frequently chose to ignore proceedings, and in that case its conduct would have to be taken to mean that the party was no longer participating in the conciliation. His delegation therefore supported the United States proposal.

The meeting was suspended at 4.30 p.m. and resumed at 5.05 p.m.

33. **The Chairman** suggested, in view of the difficulty of determining when conduct such as abandoning the conciliation might constitute a termination of the proceedings, that the secretariat should be asked to elucidate the question when finalizing the report.

34. **Mr. Jacquet** (France) was concerned at the apparent acceptance by the Commission of the notion of abandonment as a ground for terminating a conciliation. The question of abandonment had indeed been discussed, but only as a purely factual situation which ought to have a place in the Model Law. Termination of a conciliation by the conduct of a party had nothing to do with either draft article 12 or with the draft Guide. It was not abandonment which put an end to conciliation. The text of the Model Law already provided sufficient scope for a conciliator to put an end to the conciliation procedure, through the prescribed declaration, if one of the parties had neglected to pursue it. Indeed, a party which found itself the victim of an abandonment could itself make such a

declaration. There was no need for the Guide to elaborate on the question.

35. **The Chairman** said it was not feasible to conclude the discussion on draft article 13, or on paragraphs 70-74 of the draft Guide, until the secretariat had had an opportunity to clarify the implications of the Commission's decisions on draft article 12. Adoption of that article as it stood would imply that abandonment of the conciliation would be a ground for terminating it. However, as yet there was no comment in the draft Guide to cover that point.

36. **Mr. Kovar** (United States of America) said abandonment was not the issue; the issue was whether the conduct of the parties might indicate that conciliation had come to an end. The lengthy discussion of that question which had taken place in the Working Group ought to be reflected in the Model Law and in the Guide.

37. **Mr. Sekolec** (Secretary of the Commission) recalled that the delegation of the Russian Federation had proposed including in the draft Guide a reference to the possibility that an enacting State might wish to specify a requirement for the written form. Since the draft Model Law made no provision for such a requirement, the Commission should decide whether to include it in the draft Guide, as a legitimate solution to the problem raised.

38. **Mr. Holtzmann** (United States of America), supported by **Mr. Zanker** (Observer for Australia) said the provision for a requirement of the written form should appear in the context of the suggested article X (Suspension of limitation period) (footnote 3), not that of draft article 12. That was one of the circumstances in which it might be appropriate, where a State had decided to adopt article X. Otherwise, the Commission would be inviting States to depart from its own basic policy, which was that conciliation was fundamentally informal and flexible in nature, and that its beginning and end did not require the written form. That was why it had been decided to delete the qualifier "written" in draft article 12.

39. **The Chairman** said the proposal by the Russian Federation had been made in the context of the suggested draft article X.

40. **Mr. Heger** (Germany) said it was his understanding that the delegation of the Russian Federation had intended its proposal to be subsumed in draft article 12, on termination of conciliation, and that the Commission had not objected.

41. **The Chairman** said that if he heard no objection to that proposal, he would take it that the Commission wished to adopt it.

42. *It was so decided.*

Article 13. Conciliator acting as arbitrator (paras. 70-74 of the draft Guide)

43. **Mr. Kovar** (United States of America) said it would be useful to include in the draft Guide a mention of the fact that, in some systems, it was considered appropriate for a conciliator to act as an arbitrator, although in others it was not. The Commission should emphasize that it was entirely neutral on that score. It should also, in the draft Guide, remind the reader that the issue in draft article 13 was that of a conciliator acting as an arbitrator, not an arbitrator who subsequently became a conciliator; that was a situation on which the Model Law was entirely silent. A distinction should be drawn between the two situations.

44. **The Chairman** recalled that when the Working Group had been dealing with the issue of a conciliator acting as an arbitrator, it had been suggested that a conciliator could not be a judge. It was however felt that the Model Law should not be prescriptive in that regard. Speaking on behalf of the Mexican delegation, he recalled the suggestion by that delegation that the draft Guide should refer to the possibility of national legislatures dealing with the question as part of their legislation concerning the judiciary.

45. **Mr. Tang** Houzhi (China) said his delegation was satisfied that paragraph 70 reflected the consensus achieved in the Working Group. Paragraphs 70-74 were all acceptable.

Article 15. Enforceability of settlement agreement (paras. 77 to 81 of the draft Guide)

46. **Mr. Tang** Houzhi (China) said that the opening sentence of paragraph 79, which introduced an example concerning the Chinese system, did not correspond to the situation in China. Whereas the description could apply to several other countries, such as Croatia, Republic of Korea and Hungary, the practice in China was not as straightforward. There were two kinds of conciliation in his country. According to the first model, parties who had settled a dispute were entitled

to request an arbitration tribunal to rule in accordance with the settlement reached. According to the second, a court conducted the conciliation process, after which both parties could request the judge to issue a ruling in accordance with the settlement. It was unclear why the Chinese system had been chosen as an example in paragraph 79, and the current text was not entirely accurate.

47. **Mr. Holtzmann** (United States of America) said that paragraphs 79 and 80 should be deleted, on the grounds that they contained too much detail concerning specific national jurisdictions. While it had been useful for the secretariat to consider such material in preparing the draft Model Law, its inclusion in the Guide would only lead to confusion. Similarly, he failed to understand the usefulness of paragraph 81, which merely emphasized the ambiguities and weaknesses of the Model Law.

48. **Mr. Zanker** (Observer for Australia) expressed support for the deletion of paragraphs 79, 80 and 81.

49. **Mr. Tang** Houzhi (China) said that paragraph 79 was very important and should not be deleted. The information it contained reflected a general worldwide trend. His earlier intervention had been intended merely to point out the inaccuracies with regard to the situation in China, and should not be taken as support for the deletion of the paragraph. Without the details provided, settlements reached through conciliation would be more difficult to enforce. No further amendments should be made to paragraphs 79, 80 and 81.

50. **Mr. Markus** (Observer for Switzerland) said that paragraph 81 was likely to be damaging to the objective of promoting the Model Law. However, the examples provided in paragraphs 79 and 80 were enlightening, given that enforceability was a broad term, with various interpretations. He failed to understand the objections of the United States delegation.

51. **Ms. Moosa** (Singapore) said that it was helpful for States to be able to see which jurisdictions to refer to for examples of the various interpretations of enforceability, with a view to developing their own provisions.

52. **Mr. Holtzmann** (United States of America) said that the use of examples could only be justified if they constituted a balanced and nuanced reflection of world practice. Since that was impossible in such a short space, it was more judicious to leave out examples altogether. Broad statements such as those currently at the beginning of paragraphs 79 and 80 could be retained in order to provide a short summary of the situation worldwide.

53. **Mr. Sekolec** (Secretary of the Commission) acknowledged the danger of attempting to summarize national legislation in such a short space. Nevertheless, the ellipsis at the end of draft article 15 invited States to complete the article. It would be beneficial to consider the options objectively in order to guide States in determining how to approach the issue of enforceability.

Election of officers (*continued*)

54. **Mr. Sekolec** (Secretary of the Commission) announced that owing to illness, Mr. Akam Akam (Cameroon) was unable to assume the office of Chairman.

55. **Mr. Kogda** (Burkina Faso), speaking on behalf of the African Group, nominated Mr. Joko Smart (Sierra Leone) to replace him as Chairman.

56. **Mr. Morán Bovio** (Spain) expressed his regret that Mr. Akam Akam had been unable to attend the session, and he welcomed the nomination of Mr. Joko Smart.

57. *Mr. Joko Smart (Sierra Leone) was elected Chairman by acclamation.*

The meeting rose at 6 p.m.